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Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, DC 20423

Re: Ex Parte No. 638; Procedures to Expedite Resolution of Rate Challenges To Be Considered Under the Stand-Alone Cost Methodology

Dear Secretary Williams:

Enclosed are the original and 10 copies of the "Reply Comments of Edison Electric Institute" for filing in the above-referenced proceeding, and a diskette containing the Comments in WordPerfect format.

Also enclosed are three additional copies for date stamping and return via courier.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Attorney for Edison Electric Institute

Enclosure

206526

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES
TO BE CONSIDERED UNDER THE STAND-ALONE METHODOLOGY

REPLY COMMENTS OF EDISON ELECTRIC INSTITUTE AND REQUEST FOR ORAL ARGUMENT

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Attorney for Edison Electric Institute

Due Date: October 31, 2002
Dated: October 31, 2002

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES
TO BE CONSIDERED UNDER THE STAND-ALONE METHODOLOGY

REPLY COMMENTS OF EDISON ELECTRIC INSTITUTE
AND REQUEST FOR ORAL ARGUMENT

Edison Electric Institute ("EEI"), the trade association of the investor-owned electric utility industry, hereby submits Reply Comments to the Comments of Burlington Northern Santa Fe Railway Company ("BNSF") and the Association of American Railroads ("AAR"). EEI explained its interest, and that of its members, in its Opening Comments, so that explanation will not be repeated here.

Reply to AAR. AAR supports the Board's proposed rule concerning compulsory non-binding mediation, with some qualifications. One qualification AAR suggests is that the filing of mediation report with the Board could not, in AAR's view, fix the limitations period for any relief for rates or charges already paid, not as would the filing of a formal complaint. Proposed Rule 1109.4. AAR bases this objection on the Board's inability to modify a statute.

Of course, the Board has no authority to modify a statute. But AAR's objection highlights the larger problem – the Board should, by rule, require railroads to publish a rate no later than five months prior to the expiration of a transportation contract, as EEI and Western Coal Traffic League proposed. Otherwise, the shipper may not be able to file its complaint until after the contract has expired. If the Board were to do so, the shipper could then file its

complaint and mediation request at the same time, and medication could proceed simultaneously with the litigation commenced by the complaint.

In this way, the problem described by AAR would be avoided, for the filing of the Complaint would "fix the limitations period for any relief for rates or charges already paid."

EEI and AAR agree that the mediation should be private and confidential.

EEI would agree with AAR's objection to a mediator participating "in any subsequent adjudications before the Board that might follow in the event that mediation does not resolve all of the dispute," if the mediator could, as EEI proposed, rule on discovery disputes during the mediation, in order that relevant information a party requires for the mediation and litigation be produced. If the mediator does not have the power to rule on discovery that may be needed in mediation (as well as in the litigation), mediation will not be likely to resolve disputes between shippers and railroads. The reason is that the mediator will not have the facts needed to know which side's proposal is the more reasonable, as EEI explained in its Opening Comments. EEI's proposal to allow mediators to rule on discovery disputes would not violate the principle AAR has advocated of preventing a FERC ALJ from resolving the merits of a case.

EEI generally agrees with AAR's proposed criteria for selecting a mediator, except for the back-door effort by AAR to get the Board to say that railroads have a "right" to adequate revenues. They do not, for the Board has no power as a practical matter, to compel that outcome. To have a "right," one must have a remedy. Not only is there no remedy, but also a shipper is entitled to rate relief if its rate exceeds SAC ("stand-alone-costs") even if the railroad is revenue-inadequate. So the AAR argument must be rejected.

Instead, as EEI reads the statute, railroads are entitled to an opportunity to earn adequate revenues. That is all a regulated entity has a right to expect, and all that it can, as a practical matter, receive.

As for discovery, EEI emphatically disagrees with AAR, especially its view that "more restrictive standards are applied to complainants and defendants evenly." AAR Comments at 6. Even BNSF concedes that "defendants generally need less extensive discovery than complainants." BNSF Comments at 6.

So AAR (and BNSF, for that matter) are advocating significant limitations on discovery that shippers, for the most part, require. That may be the outcome AAR wants, but it is at odds with a shipper's need for extensive railroad records to put on a SAC.

Shippers need more discovery than railroads, in these proceedings, as BNSF concedes. The railroads' effort to restrict discovery is a transparent attempt to cause shippers even greater difficulty than they haven now in proving a SAC case.

The better approach, as EEI proposed, is to retain current standards permitting sufficient discovery to permit shippers to present their cases. Abuses, if any, of the current standards, may and should be dealt with one-on-one, individual proceedings. Abuses are not a reason for abandoning the standard being abused. EEI's comments suggested that the Board adhere to its current precedents, and merely cite to the decision being followed. That is all the more true, EEI believes, in light of AAR's Comments.

Also, AAR proposes that "the time frame for discovery should be limited so that extra years of data does not have to be either searched for or objected to." AAR Comments at 7. First, the STB did not propose this change, which is so fundamental to this proposal that another

round of comments after the Board made its proposal would be necessary. Second, obviously the discovery complained of by BNSF is challenging to BNSF, but so is presenting a SAC case. Arbitrary rules to limit the amount of data or other information shippers can obtain should not be adopted, because they may prevent a shipper from presenting its case.

2. Reply to BNSF. BNSF's Comments demonstrate EEI's point that the Board should not alter its discovery standard because BNSF argues that the Board went too far in granting discovery to shippers. BNSF concedes that the Board's proposed standards would be more restrictive than discovery the Board has permitted recently in pending cases. That is true, and demonstrates that the Board should not create a conflict with its discovery rulings in those cases. Rather, having determined that certain discovery was needed the Board should now stick to its guns and allow the same or similar discovery in other proceedings as well, for the same information will be just as necessary there.

In a supreme bit of irony, though, BNSF advocates a more liberal standard for discovery sought by railroads. Here, too, the Board should stick to its guns, and not simultaneously restrict discovery to shippers (who BNSF concedes need significantly more of it than do railroads) while overturning its own decision disallowing certain railroad discovery as unjustified. This proceeding should not be the place to re-litigate decisions in other proceedings.

BNSF's Comments therefore demonstrate that EEI's position – that the Board should adhere to its existing discovery standard and precedents, not depart from it – was correct. Not only do shippers need the discovery the Board heretofore has permitted (because it is extraordinarily difficult to construct a hypothetical SAC railroad), but also the Board should not

commit potentially reversible error resulting from a departure from its own discovery rulings where the need for the discovery was clearly established.

Finally, if the Board were to do as the railroads suggest, and limit shipper discovery, it should be specific about what shippers no longer will get in discovery, and what information shippers may rely on to replace it and still be found to have proven their cases.

The SAC standard is the most complex rate standard applied by a regulatory agency. The information necessary to create the SAC railroad is, largely, in the possession of the railroads. If the Board were to restrict necessary discovery without providing an adequate substitute, the Board may prevent many shippers from presenting SAC cases. That would be an unfortunate scenario, for if shippers in great numbers were so prevented, and necessary discovery denied them, questions would be raised about the continued need for an STB.

Conclusion

For the foregoing reasons, the modifications to the Board's proposed rules advocated in EEI's Opening Comments, filed October 11, 2002 herein, should be adopted, and those proposed by AAR and BNSF should be adopted (except to make mediations confidential and prevent any aspect of those proceedings from being admissible before the Board).

Respectfully submitted,

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